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No. 81-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In *re* GERALDINE G. CANNON,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER TO THE NON-JUDICIAL RESPONDENTS

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No. 81-45

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

In re GERALDINE G. CANNON,

Petitioner.

On Petition for a Writ of Mandamus
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF OF PETITIONER TO THE NON-JUDICIAL RESPONDENTS

Three arguments first raised in the schools' joint brief in opposition to the petition for a writ of mandamus, when properly clarified or corrected, demonstrate that the petition should be granted by summary action.

1. This Court clearly stated that the facts alleged in the complaints establish a violation of Title IX.

The schools say that "[n]owhere in the Court's opinion is there any ruling that [the complaints] sufficiently alleged the essential elements of a Title IX violation." (Jt. Br. Op. p.7). On the contrary; the opinion of the Court stated:

> "Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from respondents' medical education programs because of her sex. Second, these programs were receiving federal financial assistance at the time of her exclusion. These facts, admitted arguendo by respondents' motion to dismiss the complaints, establish a violation of §901(a) of Title IX." Cannon v. University of Chicago, 441 U.S. 677, 680 (1979).

Only then did the Court proceed to the question of whether petitioner could maintain her lawsuit to remedy that violation. "[T]he fact that a federal statute has been violated and some per-

son harmed does not automatically give rise to a private cause of action in favor of that person." 441 U.S. at 789./1

2. The schools' statement of the case is factually misleading.

Two references to factual matters in conflict with the allegations of the complaints as to petitioner's academic qualification are not only irrelevant on a motion to dismiss, but also misleading.

/1 In view of the constitutional case or controversy limitation on advisory opinions, prior consideration of the "sufficiency otherwise" of the complaints in stating a Title IX violation was a most appropriate, if not an absolutely necessary, subsidiary question within Rule 21.1(a). No basis or support whatever is asserted for the schools' novel claim that this Court assumed petitioner had properly pleaded that she had been the victim of sex discrimination as defined in Title IX. (Jt. Br. Op. p.7). The opinion of the Court assumed only the truth of the facts alleged in the complaints. 441 U.S. at 680. The opinion expressed no assumption at all as to what petitioner had alleged in the complaints.

(Jt. Br. Op. p.2 n.2, p.4 n.3)./2

The eight other schools to which petitioner applied all had age limits precluding her admission. At one, Chicago Medical, her test scores were higher than 101 of the 117 students admitted.

Argument that 2,000 or more applicants with better qualifications were rejected by each respondent school is based solely on the lowest subcategories of petitioner's academic qualifications. (Berry Affid. 8/14/79; Richards Affid. 9/7/79). These were not the academic selection criteria published by the schools, and no explanation was asserted for the disavowal of the published criteria implicit in the offer of such

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/2 Both the district court and the court of appeals expressly refused to reach the schools' alternative motions for summary judgment.

statistics. Ibid. Even on those terms, Chicago admitted four applicants with lower qualifications in 1975; and Northwestern, seven. Ibid.

Petitioner met all of the published selection criteria for each school -- other than age. (Assoc. Amer. Med. Colleges). Her overall grades and test scores were higher than at least 30% of those admitted at Chicago and Northwestern in 1975. Ibid. Her grades and science subtest score gave her an approximately 70% chance of admission. Ibid.

3. This Court's opinion is compatible with every applicable standard.

The schools argue that Title IX embodies the constitutional standard of discrimination, and that the complaints fail to allege that petitioner was the victim of purposeful discrimination. (Jt. Br. Op. pp.8-12). This is no more than an indirect argument that, if their

claim as to the applicable standard of discrimination is correct, then this Court's opinion was wrong in stating that the facts alleged in the complaints "establish a violation of §901(a) of Title IX." On the contrary; this Court's description of petitioner's claim that she was excluded "because she is a woman" and "because of her sex", 441 U.S. at 680, is fully compatible with the definition of "discriminatory purpose" under the constitutional standard in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) -- and every lesser standard which might be applicable under Title IX, the regulation, or the the schools' federal funding contracts./3

/3 Feeney and other cases, constitutional and nonconstitutional, have held that a discriminatory effect may be justified if necessary to the accomplishment (contd.)

However, even if there were "substantial grounds not previously presented" which might cause this Court to reconsider its prior opinion, that argument may be made only in a petition for rehearing to this Court as provided in Rule 51. After remand, no lower court may properly countenance such an argument.

CONCLUSION

Now, more than two years after this Court held that she may maintain her lawsuit, petitioner should not be delayed

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73 (contd.)
of a legitimate purpose. Here, the U.S. Commission on Civil Rights and the Department of Health, Education and Welfare have established and confirmed that school administrators may not justify age limits as necessary to the operation of federally-assisted medical education programs. See Age Discrimination Study (1977), Findings Nos. 2 (p.24), 18 (p. 76), Conclusion (pp.78-81), and Recommendation No. 12 (p.101); and 44 Fed. Reg. 33773 (June 12, 1979), respectively. Both respondent schools abolished their age limits for applicants to 1980 and subsequent classes.

for a seventh year in having an opportunity to prove the merits of her civil rights claim. A writ of mandamus should issue to reverse the judgment and vacate the opinion of the court of appeals.

Respectfully submitted,

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August 19, 1981